BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Application By SBC Communications Inc.	)	WC Docket 03-138
For Authorization Under Section 271 Of	)	
The Communications Act To Provide In-Region,	)	
InterLATA Service In The State Of Michigan	)	
	)	

OPPOSITION OF SAGE TELECOM, INC.

Jonathan E. Canis
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)

Robert W. McCausland
Vice President, Regulatory Affairs
Sage Telecom, Inc.
805 Central Expressway South
Suite 100
Allen, TX 75013-2789

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OPPOSITION OF SAGE TELECOM, INC.

Sage Telecom, Inc. ("Sage"), by its undersigned counsel, hereby respectfully submits these comments in response to the Commission's Public Notice requesting comments in the above-captioned proceeding.[1] The Public Notice invites interested parties to respond to the Application of SBC Communications ("SBC") to provide in-region interLATA services in the state of Michigan pursuant to section 271 of the Communications Act of 1934, as amended ("Act").

I. INTRODUCTION AND SUMMARY

Sage Telecom, Inc. ("Sage") is a competitive local exchange carrier ("CLEC") dedicated to serving residential and business customers, primarily in rural and suburban areas. Currently Sage serves nearly 500,000 residential and small business customers in nine states—

[1] *Comments Requested on the Application by SBC Communications Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice WC Docket No. 03-138, DA 03-2039 (June 19, 2003).

including Arkansas, California, Indiana, Kansas, Michigan, Missouri, Oklahoma, Texas, and Wisconsin—and is continuing to expand. Utilizing the Unbundled Network Element Platform ("UNE-P"), Sage offers a variety of calling plans, including its Home Choice Plan for residential customers, which includes unlimited local calling, long distance, and vertical features, such as Caller ID, Call Waiting and Call Forwarding. Founded in 1996, Sage Telecom has become one of the fastest growing residential competitive local exchange carriers.

By these comments, Sage opposes SBC's Application for Section 271 relief in Michigan because SBC has failed, and continues to fail, to satisfy competitive Checklist items one and two. Checklist item one[2] requires SBC to provide equal-in-quality interconnection to Sage on terms and conditions that are just, reasonable and nondiscriminatory *in accordance with the terms and conditions of the interconnection agreement between the parties* and according to the requirements of sections 251 and 252 of the Act.[3] However, SBC has attempted to unilaterally impose billing terms and conditions and procedures upon Sage for all so-called "Incollect" calls that are nowhere to be found in the terms of the interconnection agreement governing the parties relationship.[4] Sage submits that SBC's practice regarding Incollect calls clearly contravenes the interconnection agreement between the parties, and constitutes a violation of Section 251(c)(2)(D) of the Act. Accordingly, SBC is in violation of Checklist item one.

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2 47 U.S.C. § 271(c)(2)(B)(1)

3 47 U.S.C. § 271(c)(2)(B)(ii).

4 Sage, as a last resort and after being ignored by SBC for months, filed a complaint against SBC at the Michigan Public Service Commission addressing SBC's illegal and anticompetitive attempts to force Sage to pay for all Incollect Traffic for which Sage was billed by SBC. During the pendancy of the complaint, Sage will continue to engage in negotiations with SBC and is hopeful that a settlement of these issues can be reached.

In addition, SBC has failed to comply with Checklist item 2, which requires SBC to provide nondiscriminatory access to unbundled network elements ("UNEs"). SBC is deficient in compliance with this requirement in two respects. First, SBC improperly bills Sage for the Incollect calls, as described above. Second, SBC violates Checklist item 2 by its failure to render to Sage complete and accurate call detail records ("CDR") so that Sage can collect all access revenues to which it is entitled. Accordingly, SBC is not providing nondiscriminatory access to its operations support system ("OSS") in compliance with Checklist item 2. The Commission should, at a minimum, reject SBC's application until SBC has ceased its grossly anticompetitive practice of unilaterally billing Sage for all Incollect charges incurred by Sage's end-user customers for SBC services, and until such time as SBC is capable of providing Sage with complete and accurate call detail records.

II. SBC'S APPLICATION FAILS TO SATISFY CHECKLIST ITEM ONE

Section 271(c)(2)(b)(i) of the Act requires a Section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[5] Section 251(c)(2) imposes a duty on incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[6]

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5 47 USC § 271(c)(2)(B)(i); *see Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-40415 FCC Rcd at 3977-78, para. 63 (Bell Atlantic New York Order); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640, ¶ 61; *Ameritech Michigan Order*, 12 FCC Rcd at 20662, ¶ 222.

6 47 USC §251(c)(2)(A).

Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection "at any technically feasible point within the carrier's network."[7] Second, an incumbent LEC must provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[8] Finally, the incumbent LEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, *in accordance with the terms of the agreement* and the requirements of [section 251] and section 252."[9] Thus, in order to demonstrate compliance with item one of the competitive Checklist, a BOC must show that it is complying with each of the three prongs of Section 251. SBC, by unilaterally billing Sage for "Incollect" charges, is in effect unilaterally amending the terms, conditions and billing procedures agreed upon by the parties in their interconnection agreement, executed between Sage and SBC on August 9, 2002 and failing to provide interconnection to Sage on a just reasonable and nondiscriminatory basis, *in accordance with the agreement between the companies.*

Specifically, SBC originates and completes a significant number of collect calls to Sage end-users who, according to SBC, accept the charges for the SBC originated collect calls, known as "Incollect Calls," the majority of which are originated from prison pay phones.[10] SBC then sends Sage a daily usage feed ("DUF") that contains the telephone number of the Sage end-user who purportedly accepted the call, the number of minutes of the call, and the SBC tariffed rate to be applied to the call. Sage uses the DUF record to create an invoice for the Incollect

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7 47 USC §251(c)(2)(B).

8 47 USC §251(c)(2)(C).

9 §251(c)(2)(D) (emphasis added).

10 Incollect calls also include calls from third parties, other than SBC, however in those instances SBC has reached an agreement with the third party that SBC will bill for those calls and the records are simply passed through to Sage.

charges based solely on the information provided via the DUF, and bills the Sage end-user, who is asked to remit payment to Sage. If payment is remitted by the end user, Sage remits the collected monies to SBC. If however, the Sage end user does not pay the Incollect invoiced amount, collection efforts are undertaken by Sage consistent with Sages's own billing and collection procedures. If after 60 days the end user has not paid, Sage notifies SBC of the arrearage and SBC may notify Sage if SBC wishes to request a block for incoming Incollect calls to a specific end user.

Despite the fact that the interconnection agreement between Sage and SBC clearly *does not require Sage to assume financial responsibility for uncollectible Incollect call* charges, and rather, contemplates Sage merely functioning as the billing and collection agent for SBC provided and completed Incollect calls, SBC has demanded that Sage assume financial responsibility for 100% of Incollect charges, including those charges that are uncollectible or unbillable.

Sage challenged SBC's practice of demanding 100% payment from Sage for Incollect calls before the Texas Public Utilities Commission. The Texas arbitrator properly concluded that SBC had the financial responsibility for such calls because Sage was simply SBC's billing agent, and SBC could not demand payment from Sage.[11] As a result of the Texas arbitration decision, Sage and SBC-Texas implemented business practices that have governed the billing and payment of Incollect calls between the parties. Nonetheless, SBC has refused to implement similar arrangements in Michigan, despite Sage's successful Texas challenge to

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[11] *See Petition of MCI MetroAccess Transmission Services LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, LP for Arbitration with Southwestern Bell Telephone Under the Telecommunications Act of 1996, PUCT Docket No. 24542* (rel. Oct. 3, 2002). Relevant portions of the decision, specifically portions of the order (including the Executive Summary) relating to DPL Issue No. 41, which address the Incollect issue, are attached hereto as Exhibit A.

SBC's attempt to unilaterally amend the terms of the interconnection agreement between the parties as it pertains to Incollect calls. Rather, SBC has taken the same untenable position on the issue in Michigan, and demanded that Sage to pay for 100% of the cost of Incollect calls.

In fact, SBC continues to bill Sage for Incollect calls, despite the fact that Sage notified SBC that it would dispute any and all invoices that billed Sage for Incollect charges on a going-forward basis. SBC has refused to implement with Sage a consistent set of practices and procedures for Incollect calls on a 13 state region-wide basis based upon the fair and efficient arbitration results in Texas. Apparently, SBC would rather force time-consuming and costly re-litigation of the issue with CLECs in each state *seriatim*.

Accordingly, the Commission must find SBC in violation of Checklist item one for attempting to unilaterally impose upon Sage provisions that are not part of the interconnection agreement between the parties. In fact, SBC has as much as acknowledged that the terms it has sought to foist upon Sage are not part of the agreement by offering to provide an amendment to the agreement governing "Alternately Billed Service" or the ABS Appendix. SBC's proposal of the ABS appendix is a *de facto* acknowledgement that the existing interconnection agreement between the parties does not obligate Sage to accept one-hundred percent of SBC's uncollectible incollect charges.

Not only does SBC's action with respect to Incollect calls violate Checklist item one, SBC's behavior underscores SBC's ability to impose additional costs on its competitors, making it potentially uneconomic to compete against SBC. By leveraging its position as the monopoly provider of telephone exchange and exchange access services in its territory—and knowing full well that Sage has no choice but to interconnect with and purchase critical inputs from it—SBC has created a situation where Sage is forced to either agree to pay SBC an amount

to which it is not entitled, or expend significant financial resources to litigate the issue in every state where Sage seeks interconnection with SBC. Either way, SBC is successfully able to saddle Sage with unnecessary costs.

Accordingly, the Commission should find that SBC has failed to comply with Checklist item one. The interconnection agreement between the parties clearly does not contain the terms and conditions that SBC is attempting to shoe-horn into it in order to unfairly increase Sage's cost of doing business and extract revenue from Sage to which it is not legally entitled.

III. SBC'S APPLICATION FAILS TO SATISFY CHECKLIST ITEM TWO BECAUSE ITS PROVIDES INACCURATE BILLS AND INACCURATE CALL DETAIL RECORDS TO SAGE

Section 271(c)(2)(B)(ii) requires an applicant for 271 authority to provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)."[12] The Commission "has determined that access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory and just and reasonable."[13] Specifically, a BOC must demonstrate that it provides non-discriminatory access to the five OSS functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing.[14] Thus, in order to demonstrate compliance with the competitive Checklist, a BOC must show that it is

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12 47 U.S.C. § 271(c)(2)(B)(ii).

13 Bell Atlantic New York Order, ¶ 84..

14 *Bell Atlantic New York Order*, 15 FCC Rcd at 3989, ¶ 82. The Commission has defined OSS as the various systems, databases, and personnel used by incumbent LECs to provide service to their customers. *See SWBT Texas Order*, 15 FCC Rcd at 18396-97, para. 92; *Bell Atlantic New York Order*, 15 FCC Rcd at 3989-90, ¶ 83; *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539, 585, ¶ 82 (*BellSouth South Carolina Order*).

providing just, reasonable, and nondiscriminatory access to OSS, including the billing component of the OSS UNE. In analyzing whether a BOC is providing adequate OSS access, the Commission analyzes each of the primary OSS functions – pre-ordering, ordering, provisioning, maintenance and repair, and billing – through a two-part inquiry. "First, [the Commission] determine[s] whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions.... [The Commission] next assess[es] whether the OSS functions that the BOC has deployed are operationally ready as a practical matter."[15]

Specific to the billing component of OSS, in previous section 271 decisions, the Commission has held that, pursuant to Checklist item 2, BOCs must provide competitive LECs with two essential billing functions: (i) complete, accurate and timely reports on the service usage of competing carriers' customers and (ii) complete, accurate and timely wholesale bills. Service-usage reports and wholesale bills are issued by incumbent LECs to competitive LECs for two different purposes. Service-usage reports generally are issued to competitive LECs that purchase unbundled switching and measure the types and amounts of ILEC services that a competitive LEC's end-users use for a limited period of time, usually one day.

In contrast, wholesale bills are issued by incumbent LECs to competitive LECs to collect compensation for the wholesale inputs, such as unbundled elements, used by competitive LECs to provide service to their end users. Generally, wholesale bills are issued on a monthly basis. Service-usage reports are essential because they allow competitors to track and bill the

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15 *Id.*, ¶ 88 (emphasis added) (citations omitted) (internal quotations omitted).

types and amounts of services their customers use.[16] Wholesale bills are essential because CLECs like Sage must monitor the costs they incur in providing services to their customers.[17]

A BOC must demonstrate that it provides "competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that it provides such information to itself, and a wholesale bill in a manner that gives competing carriers a meaningful opportunity to compete."[18] In making such an inquiry, the Commission evaluates a BOC's billing processes and systems and billing performance metrics.[19] The Commission also has looked at whether billing issues presented are competitively significant.[20]

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16 *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 4075, ¶ 226.

17 *See, e.g., SWBT Kansas/Oklahoma Order*, 16 FCC Rcd 6237, 6316-17, ¶ 163; Department of Justice Evaluation at 11-14 (inaccurate bills prevent competitive LECs from "determining whether Verizon is charging them correctly for services they have ordered," increase competitive LECs' "costs of doing business in Pennsylvania," and "impedes not only efficient provisioning of new services, but also the raising of capital"); Pennsylvania Commission Comments at 102 ("Verizon PA needs to issue timely, accurate, auditable bills . . . to give its [competitive] LEC customers a meaningful and realistic opportunity to accurately assess their operational costs.").

18 *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 97 (rel. Apr. 16, 2001)("Massachusetts 271 Order"). *See also, Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996, to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 210 (rel. June 30, 2000) ("Texas 271 Order") and *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 163 (rel. Jan. 22, 2001) ("Kansas/Oklahoma 271 Order").

19 *Id.*

20 Massachusetts 271 Order, ¶ 98 (noting that exceptions related to billing issues were not "competitively significant").

SBC has failed to provide Sage with either of the two "essential billing functions" described by the FCC, and they are both competitively significant. First, as described fully above in Section II, SBC's wholesale bills to Sage include improper charges for Incollect calls. Second, SBC has failed to provide Sage with complete and accurate Call Detail Records ("CDR") regarding the terminating access services that Sage provides to its access customers, including SBC itself. Indeed, an audit of Sage's May 2003 CDRs for the state of Michigan indicates that the terminating access CDRs received from SBC underreport the volume of traffic terminated by Sage by more than 14%. However, the discrepancy is much higher in other SBC states where Sage operate. Indeed, the in the SBC states where Sage operates, Sage's internal audits reveal that SBC's reporting of terminating access traffic attributable to Sage is off by over 70% on the average, per month, region-wide. Such enormous errors by SBC are depriving Sage of revenue to which it is entitled.

Accurate CDRs from SBC are the only means by which Sage can bill in a timely and accurate way for access services. Despite Sage's repeated attempts over the last several months to resolve this issue, no solution currently appears to be in sight. Sage is still without the necessary information required to ensure complete and accurate billing for terminating access services. Moreover, the longer SBC waits to provide it, the more stale the invoices become, and the greater the risk of nonpayment to Sage becomes. Obviously, this situation is having a negative financial impact on Sage.

Accordingly, depriving Sage of the ability to bill access customers for service puts Sage at a significant competitive disadvantage. In previous 271 proceedings, the Commission has noted the gravity of billing issues, and their detrimental effect upon competing carriers. In the Texas 271 Order, the Commission noted that billing issues "can cause direct

financial harm to competing carriers."[21] SBC's billing problems are "competitively significant"[22] for Sage. Foremost, without timely and accurate CDR, Sage cannot thereby bill its customers and collect revenues to which it is entitled.

With respect to the Incollect billings, Sage is forced to undertake the time-consuming process of auditing a bill and documenting the dispute, and as in Texas and Michigan, litigating the charges.

IV. CONCLUSION

Consistent with the foregoing, the Commission should reject SBC's application.

Respectfully submitted,

Jonathan E. Canis
Ross A. Buntrock
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)

Robert W. McCausland
Vice President, Regulatory Affairs
Sage Telecom, Inc.
805 Central Expressway South
Suite 100
Allen, TX 75013-2789

Dated: July 2, 2003

21 Texas 271 Order, ¶ 211.

22 Massachusetts 271 Order, ¶ 98.

EXHIBIT A
Excerpts of Revised Arbitration Award
In Texas P.U.C. Docket 24542
D.P.L. Issue Number 41

PUC DOCKET NO. 24542

PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, SAGE TELECOM, INC., TEXAS UNE PLATFORM COALITION, MCLEOD USA TELECOMMUNICATIONS SERVICES, INC., AND AT&T COMMUNICATIONS OF TEXAS, L.P. FOR ARBITRATION WITH SOUTHWESTERN BELL TELEPHONE COMPANY UNDER THE TELECOMMUNICATIONS ACT OF 1996	§ § § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

REVISED ARBITRATION AWARD

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PUC DOCKET NO 24542

PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, SAGE TELECOM, INC., TEXAS UNE PLATFORM COALITION, MCLEOD USA TELECOMMUNICATIONS SERVICES, INC., AND AT&T COMMUNICATIONS OF TEXAS, L.P. FOR ARBITRATION WITH SOUTHWESTERN BELL TELEPHONE COMPANY UNDER THE TELECOMMUNICATIONS ACT OF 1996	§	PUBLIC UTILITY COMMISSION OF TEXAS

ARBITRATION AWARD

This Arbitration Award (Award) establishes the terms of the interconnection agreement between Southwestern Bell Telephone Company (SWBT) and MCIMetro Access Transmission Services, LLC (MCIm). In this Award, the Arbitrators address a number of disputed issues, ranging from whether SWBT must continue to offer unbundled local switching and combined unbundled network elements (UNEs) to competitive local exchange carriers (CLECs), to whether the Public Utility Commission of Texas (Commission) should recalculate UNE loop costs and rates. Resolution of many of the issues required an assessment of the role of the UNE-P platform in Texas. The Arbitrators have determined that UNE-P remains a necessary option for CLECs in the Texas market.

SWBT and any CLEC that has requested arbitration in this proceeding pursuant to § 252 of the Federal Telecommunications Act of 1996[1] shall incorporate the decisions and language approved in this Award in any interconnection agreement that is subject to the outcome of this proceeding, including the language adopted by the Arbitrators, as reflected in the attached contract matrix.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

I. EXECUTIVE SUMMARY

In this Arbitration Award, the Commissioners of the Public Utility Commission of Texas (Commission), Brett A. Perlman and Rebecca Klein, served as the arbitrators. The Arbitrators, with the assistance of Commission staff advisors, conducted the arbitration in accordance with the Commission's rules and FTA § 252(c). The issues resolved in this Award are limited to policy and substantive determinations, and the identification of terms to be included in the interconnection agreement that reflect those determinations. Issues related to pricing and cost shall be resolved in a subsequent cost proceeding. The specific contract terms adopted by the Arbitrators are set forth in a matrix attached to this Award.

This Executive Summary does not attempt to describe each of the determinations made in the Award. Instead, it seeks to highlight issues the Arbitrators consider to be of particular interest to the public, those most hotly contested by the parties, and overarching issues that affect the determination of multiple items in the parties' joint decision point list (DPL). This summary is not intended to serve in lieu of the more extensive discussions provided in the body of the Award and, if and to the extent this summary might be construed as deviating from the language of the Award, the language of the Award governs.

Application of the T2A and the Legitimately Related Provisions

In resolving the issues the parties raised in this arbitration, the Arbitrators answered two broad questions addressed to the Texas 271 Agreement (T2A).[2] First, the Arbitrators clarified the role of the T2A in this and future arbitrations and the deference to be accorded to the T2A.[3] Specifically, the T2A is an expression of Commission policy. The Arbitrators' reliance on a provision of the T2A is based on the Commission's judgment and rationale in originally adopting the relied-upon provision. Where a party can show that a different set of facts or some change in the relevant law or circumstances warrants a judgment or decision other than the one reached in the T2A, the Commission will not be bound by the terms of the T2A. Absent such a showing, however, the Commission is reluctant to repeatedly revisit the same policy issues.

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[2] *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Docket No. 16251, Order No. 55 (October 13, 1999) ("T2A").

[3] The Arbitrators' comments regarding T2A apply with equal force to Awards and Agreements arising out of other T2A-based proceedings, such as the *MCI WorldCom Agreement.*

Second, the Arbitrators considered the application of Attachment 26 and the legitimately related terms and conditions of the T2A. The Arbitrators conclude that a CLEC may opt into any provision of the T2A that is not legitimately related to any term or condition the CLEC seeks to arbitrate. Conversely, a CLEC may not opt into any term or condition of the T2A that is legitimately related to any term or condition the CLEC seeks to arbitrate. However, a CLEC may proffer, as the language it seeks through arbitration, language from the T2A. The fact that it is the same language as that found in the T2A is not, by itself, any basis to reject such language. To the contrary, the Commission's prior approval of the language is some indicia of the acceptability of the language. When faced with competing language, the Arbitrators adopt the language the Arbitrators conclude is best supported by the facts and the law. Where a CLEC offers language the same as or substantially identical to language from the T2A, and the ILEC offers neither competing language nor substantive basis for rejecting the proffered language, the Arbitrators may award language that mirrors language from the T2A, notwithstanding the fact that the CLEC was barred from automatic entitlement to the proffered language.

13-State and 12-State Language

The Arbitrators decline to adopt SWBT's proposed 12- and 13-State Agreement language. Notwithstanding whatever benefits SWBT might derive from the inclusion of such language, and even if such language might, in some instances, offer system-wide consistency, inclusion of the language is improper. First, some of the language pertains to issues not negotiated or expressly arbitrated by the parties in this proceeding. Second, inclusion of the proposed language improperly imposes on the Commission to discern and apply the law and contract terms applicable in other jurisdictions. Third, the language does not affect conduct in Texas and is therefore superfluous and poses the risk of confusion while unnecessarily adding to the length of the contract.

Unbundled Network Elements

The Arbitrators find that CLECs are impaired in Texas without access to local switching as an unbundled network element (UNE), and that there is competitive merit and it is the public interest to make local switching available on an unbundled basis. In addition, the Arbitrators find that the exception the FCC carved out to the requirement that ILECs provide local switching

as a UNE is triggered only when the ILEC provides nondiscriminatory, cost-based access to the enhanced extended link (EEL). Because SWBT has not satisfied this condition, the Arbitrators find that the exception is not currently applicable. Moreover, to increase market certainty and to ensure that CLECs in Texas would not be impaired without unbundled local switching for some or all Texas customers, the Arbitrators hold that implementation of the EEL requires Commission oversight to ensure that the EEL is properly available and that CLECs have an adequate opportunity to transition to market-based pricing or to seek alternative providers of local switching. The Arbitrators find, therefore, that if and when SWBT desires to invoke an FCC carve out or exception to treating local switching as a UNE, SWBT has the burden of initiating a proceeding before the Commission for that purpose. The Commission will then provide oversight of the proposed EEL transition, and evaluate the applicability of any FCC carve out in effect at that time. This process will allow all interested parties to present evidence on whether the exception should be applied as proposed by the FCC or in some other manner, consistent with FCC guidance and the state of applicable law at that time.

Similarly, the Arbitrators find that SWBT must continue to provide Directory Assistance and Operator Services (OS/DA) as UNEs. The *UNE Remand Order* requires ILECs to unbundle OS/DA services unless the ILEC provides customized routing to a requesting carrier to allow it to route traffic to alternative OS/DA providers. The Arbitrators find that SWBT has not accommodated technologies used by CLECs for customized routing. Therefore, the Arbitrators hold that SWBT shall continue providing OS/DA services as an unbundled network element until SWBT initiates a proceeding before the Commission to demonstrate that it has met the customized routing requirements. This process will allow all interested parties to inform the Commission's decision with evidence of the facts that exist at that time and, if necessary, allow the Commission to consider evidence regarding whether CLECs would be impaired in Texas without access to OS/DA from SWBT on an unbundled basis.

The Arbitrators further find that multiplexing shall be available as a UNE on a stand-alone basis to the extent that "stand-alone" refers to the whole of the multiplexing unit in combination with other UNEs. In addition, the Arbitrators hold that SWBT shall provision digital cross-connect systems (DCS) at forward-looking cost-based rates, and that SWBT cannot require MCIm to collocate in order to obtain DCS in association with unbundled dedicated transport (UDT).

With respect to certain issues, the Arbitrators find that SWBT must provide a service or feature because it is part of the features, functions, or capabilities of a UNE. For example, the Arbitrators find that the features, functions, and capabilities of the local switching network element include the routing of calls to voice-mail through I/O ports. Similarly, the Arbitrators hold that a line class code (LCC) is a feature, function, or capability of the unbundled local switch. However, if a new LCC is custom-configured in response to a CLEC request, a forward-looking cost-based rate shall apply for such custom configuration.

Because of SWBT's exclusive control over network elements, the Arbitrators find that SWBT must provide CLECs with nondiscriminatory access to combine UNEs before seeking to discontinue offering combinations of UNEs. Because SWBT has not satisfied this condition, SWBT must continue to offer new combinations to CLECs upon request at least until SWBT has demonstrated in a separate proceeding that it is providing nondiscriminatory access to UNEs in such a manner that allows CLECs to combine UNEs for themselves without having to collocate.

Access to the Databases as UNEs

The Arbitrators hold that SWBT shall continue to provide the call-related databases, including the directory assistance database, as UNEs. Although SWBT must provide access to the Line Information and Caller ID with Name databases as UNEs, SWBT is not required to provide access to these databases on a bulk download basis. SWBT is providing CLECs with nondiscriminatory access to these call-related databases on an unbundled basis for purposes of switch query and database response through the SS7 network at forward-looking, cost-based rates.

Re-evaluation of Rates

The Arbitrators find that changes in technology due to Project Pronto warrant reevaluation of UNE rates in a separate cost proceeding. The Arbitrators reject the suggestion that cost studies from other proceedings should dictate the rates set in this separate cost proceeding. However, relevant information developed in those proceedings should be considered.

On other related issues, both parties suggested re-apportioning the rate structure for ULS, but the Arbitrators find that the current structure, which is a hybrid of the different structures proposed by parties, is the most appropriate. Furthermore, the Arbitrators find that CLECs should pay SWBT for the daily usage feed, but determine that the amount of this fee should be evaluated in a separate cost proceeding.

The Arbitrators further find that the current rate structure for LIDB query access should stand, and that all LIDB query rates should continue to be based upon Texas-specific costs. Finally, the Arbitrators find that MCIm is not entitled to access SWBT's databases at TELRIC rates when acting as an IXC.

Deposits, Changes, and Special Requests

- The Arbitrators find that SWBT's proposal for a deposit is appropriate and commercially reasonable, but should be applied so as to avoid becoming a barrier to entry.
- The Arbitrators find that MCIm has agreed to use SWBT's Bona Fide Request (BFR) process as outlined in SWBT's CLEC on-line handbook. SWBT's proposed BFR process appears to provide a reasonable procedure for the recovery and allocation of the cost associated with CLEC requests. In addition, SWBT may charge a deposit, in an amount to be determined, to offset those costs.
- SWBT's network planning and design must be coordinated with other telecommunications carriers so as to facilitate "effective and efficient interconnection" as required by FTA § 256. However, SWBT's duty to maintain the functionality and required characteristics of the elements purchased by a CLEC is limited to a period of not more than 12 months, exclusive of the required notice period, unless otherwise agreed by the parties.

Alternately Billed Services

The Arbitrators find that the issues related to Alternately Billed Traffic (ABT) should be addressed in a separate billing agreement between the parties and should not be incorporated into an interconnection agreement. Where parties are unable or unwilling to develop a comprehensive billing agreement to address ABT, then the provider of the Incollect or Outcollect services shall bill the end use customer directly. The Arbitrators adopt language to be

incorporated in a new Attachment 27-ABT, to provide guidance to the parties in addressing prospective ABT issues.

The Arbitrators also find that the existing contracts between SWBT and the CLECs do not make the CLECs liable for uncollectibles attributable to the CLECs' customers. The language and the consideration reflect the existence of a duty only to bill the customers, not to be responsible to SWBT for uncollectibles.

II. JURISDICTION

If an incumbent local exchange carrier (ILEC) and CLEC cannot successfully negotiate rates, terms, and conditions in an interconnection agreement, FTA § 252(b)(1) provides that either of the negotiating parties "may petition a State commission to arbitrate any open issues." The Commission is a State regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA. Pursuant to FTA § 252(b)(1), MCIm, a CLEC, petitioned the commission to arbitrate a dispute with SWBT, an ILEC, as described more fully below.

III. PROCEDURAL HISTORY

On August 22, 2001, MCIm filed its petition for arbitration of an interconnection agreement with SWBT under the FTA and pursuant to P.U.C. PROC. R. 22.305.[4] The petition requested the Commission's assistance on the issues of setting wholesale rates that reflect today's technology; allowing MCIm to market ubiquitous service to small business customers with greater than three lines; continuing the general availability of unbundled network elements (UNEs), including OS/DA and new combinations; and resolving contractual disputes that MCIm asserted threaten MCIm's ability to profitably provide telephone services to Texas customers.

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[4] *Petition of MCImetro Access Transmission Services, L.L.C. for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company under the Telecommunications Act of 1996*, Docket No. 24542 (pending).

On September 4, 2001, Sage Telecom of Texas, LP (Sage)[5] filed a complaint against SWBT for implementation of billing procedures for incollect calls pursuant to P.U.C. PROC. R. 22.321.[6] Sage's complaint in Docket No. 24593 raised only one issue relating to billing terms, conditions, and procedures for Incollect Calls. This issue was deemed to be identical to Issue No. 12 in this docket.[7] Sage requested that its complaint be consolidated with this docket.

On September 7, 2001, the Texas UNE Platform Coalition (UNE-P Coalition),[8] AT&T Communications of Texas, L.P. (AT&T), and McLeod USA Telecommunications Services, Inc. (McLeod) (collectively CLEC Coalition) filed a joint petition in Docket No. 24631, requesting expedited resolution of disputed issues regarding unbundled network element platform (UNE-P) competition in Texas.[9] The CLEC Coalition requested that its petition be consolidated with this docket, or alternatively, that the Commission address the CLEC Coalition's petition in an industry-wide contested rulemaking proceeding.

On September 12, 2001, a prehearing conference was held for Docket Nos. 24542, 24593, and 24631. The parties agreed that the jurisdictional deadline in Docket No. 24542 was January 11, 2002. On September 20, 2001, the parties filed briefs regarding consolidation of these three dockets. After consideration at the October 3, 2001 open meeting, the Commission ordered that Docket Nos. 24542, 24593, and 24631 be consolidated under Docket No. 24542.[10] The Commission also excluded the associations Comp-Tel, ASCENT, and SWCTA as parties but allowed these associations to participate in an *amicus curiae* fashion.[11]

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[5] On February 27, 2002, the service provider certificate of operating authority held by Sage Telecom, Inc. was transferred to Sage Telecom of Texas, LP. *See Application of Sage Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 25331 (Feb. 27, 2002).

[6] *Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company for Implementation of Billing Procedures for Incollect Calls*, Docket No. 24593 (Oct. 16, 2001).

[7] Order No. 5 at 2 (Oct. 12, 2001).

[8] The Texas UNE Platform Coalition is composed of the following companies and their representative associations: Birch Telecom, ionex telecommunications, Logix, nii, Talk America, TXU Communications, Z-Tel Communications, Inc., the Competitive Telecommunications Association (CompTel), the Association of Communication Enterprises (ASCENT), and the Southwest Competitive Telecommunications Association (SWCTA).

[9] *Petition for Expedited Resolution of Disputed Issues Regarding UNE-P Competition in Texas*, Docket No. 24631 (Oct. 16, 2001).

[10] Order No. 5 (Oct. 12, 2001) closed Docket No. 24593; Order No. 6 (Oct. 16, 2001) closed Docket No. 24631.

[11] Order No. 6 at 1-2.

On October 10, 2001, Sage filed a petition for expedited resolution of disputed issues regarding UNE-P competition in Texas that incorporated the UNE-P petition in its entirety and incorporated Sage's grounds for justiciable interest filed in its motion to intervene in Docket No. 24542.[12] Sage requested that its petition in Docket No. 24814 be consolidated with Docket No. 24542. On October 15, 2001, SWBT filed its response to Sage's petition and a motion to dismiss, asserting that no federal or state law conferred jurisdiction upon the Commission to ignore the plain terms of Sage's existing T2A contract and that the contract did not authorize the relief Sage had requested.

On October 17, 2001, a determination was made that good cause existed to allow consolidation of Docket No. 24814 with Docket No. 24542 and to grant Sage's request for a good cause exception under P.U.C. PROC. R. 22.5 to the participation restrictions found in P.U.C. PROC. R. 22.305(e).[13] SWBT's motion to dismiss Docket No. 24814 was denied.[14]

After consolidation of these proceedings, the parties in this Docket No. 24542 are Southwestern Bell Telephone Company (SWBT), MCIMetro Access Transmission Service (MCIm), Sage Telecom of Texas, LP (Sage), UNE-P Coalition, AT&T Communications of Texas (AT&T) and McLeod USA Telecommunications Services, Inc. (McLeod). Accordingly, Docket No. 24542 was restyled as *Petition of MCImetro Access Transmission Services, L.L.C., Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc., and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996.*

In addition, on October 17, 2001, a revised procedural schedule[15] was issued reflecting the parties' implicit agreement that negotiations in this proceeding would be deemed to have begun on July 6, 2001 thereby effectively extending the jurisdictional deadline to April 1, 2002, to accommodate a hearing conducted by the Commission in January 2002. On October 17, 2001, the parties requested approval of an agreed protective order to govern the use of any documents

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[12] *Petition of Sage Telecom, Inc. for Expedited Resolution of Dispute Issues Regarding UNE-P Competition in Texas*, Docket No. 24814 (Oct. 17, 2001).

[13] P.U.C. PROC. R. 22.305(e) states: "Only parties to the negotiation may participate as parties in the arbitration hearing. The arbitrator may allow interested persons to file a statement of position and/or list of issue to be considered in the proceeding."

[14] Order No. 7 (Oct. 17, 2001).

in this proceeding designated as confidential and exempt from public disclosure under Texas law.[16] The parties' request was granted.[17] The parties engaged in discovery through November 13, 2001. Direct testimony was filed on December 7, 2001; rebuttal testimony was filed on December 21, 2001. The hearing on the merits was held on January 28, 29, and 30, 2002. Post-hearing Initial Briefs were filed on February 15, 2002. Post-hearing Reply Briefs were filed on March 1, 2002. Subsequent to the March 21, 2002 Open Meeting, the parties agreed to treat the start of negotiations for this proceeding as August 6, 2001, effectively extending the jurisdictional deadline for an Award in this proceeding to May 2, 2002.

On November 26, 2001, the parties filed their initial joint decision point list (DPL), and on January 24, 2002, the parties filed their final DPL.[18] During the course of this proceeding, the parties settled, withdrew, or otherwise resolved DPL issues 1, 4, 27, 28, 29, 35, 44, and 52-55.[19] All of the decisions rendered in this Award are intended to resolve disputed issues identified by the parties to this proceeding. If the parties settled or withdrew an issue during the course of the proceeding, a decision on the issue is not included in this Arbitration Award.

IV. Relevant State and Federal Proceedings

Relevant Commission Decisions

SWBT Mega-Arbitration Awards

The Federal Telecommunications Act (FTA) became effective in February 1996. Soon thereafter, several proceedings—collectively referred to as the Mega-Arbitrations—were initiated and consolidated for the purpose of arbitrating the first interconnection agreements in Texas under the new federal statute. The first Mega-Arbitration Award, issued November 1996 in Docket No. 16189, established rates for interconnections, services, and network elements in

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[15] Order No. 8 (Oct. 17, 2001).

[16] *See* TEX. GOV'T CODE ANN. §§ 552.002-552.353 (Vernon 1994 & Supp. 2002).

[17] Order No. 9 (Oct. 17, 2001).

[18] Joint Exh. 2, Final Decision Point List. FTA § 252(b)(4) limits the issues that may be decided in arbitration to those set forth by the parties.

[19] *See* letter filed by SWBT on behalf of parties (Feb. 14, 2002).

accordance to the standards set forth in FTA § 252(d).[20] Interim rates were established and SWBT was ordered to revise its cost studies. The Second Mega-Arbitration Award, issued December 1997 in Docket No. 16189, approved cost studies and established permanent rates for local interconnection traffic.[21]

Texas 271 Agreement "T2A"

After a series of 'collaborative work sessions' between SWBT and CLECs, the Commission approved the T2A on October 13, 1999. As a condition of receiving approval pursuant to FTA § 271 to provide long-distance services within the state, SWBT agreed to offer this standard interconnection agreement to all CLECs for a period of four years.[22] Among other things, the T2A established: (1) a performance remedy plan with 132 performance measures relating to all aspects of SWBT's wholesale operations; (2) prices, terms and conditions for resale, interconnection, and the use of UNEs; (3) a commitment from SWBT to provide combinations of UNEs, including UNE-P for existing and new lines and enhanced extended links (EELs); (4) operations support systems (OSS) that provide CLECs with parity; and (5) minimal service disruptions associated with hot cut loop provisioning that affects end use customers. Pursuant to FTA § 252(i), many CLECs subsequently opted into the T2A.

MCI WorldCom Arbitration with SWBT

MCI WorldCom's interconnection arbitration with SWBT centered on whether MCI could take language directly from the T2A and propose it under its own contract without exercising the FTA's most favored nations (MFN) clause (also called the "pick and choose" rule).[23] The Commission found that a CLEC wishing to opt into T2A language, or something strikingly similar (including the terms and conditions of an attachment or appendix), is also required to opt into the legitimately related terms and conditions of the T2A.

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[20] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al.*, Award (Nov. 8, 1996) (First Mega-Arbitration Award).

[21] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al.*, Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

[22] Certain sections of the T2A expired October 13, 2001; others expire October 13, 2003.

Relevant Federal Communications Commission Decisions

Local Competition Order

In the *Local Competition Order,*[24] the FCC implemented FTA §§ 251 and 252. The FCC identified unbundled network elements (UNEs) that ILECs must make available to competitors, and established minimum requirements for nondiscriminatory interconnection and collocation arrangements. That order contained, among other things, default rates, a mandatory pricing methodology (total element long run incremental cost, or TELRIC), the FCC's interpretation of the FTA's MFN clause,[25] and guidelines for states to use when determining whether a competitor should have access to particular UNEs.

The UNE Remand Order

In late 1999, the FCC issued the UNE Remand Order in response to the Supreme Court's January 1999 decision,[26] which directed the FCC to reevaluate the unbundling obligations established by FTA § 251.[27] The Court required the FCC to revisit its application of the "necessary" and "impair" standards in FTA § 251(d)(2).[28] In applying the "necessary" and "impair" standard to individual network elements, the FCC made certain critical determinations. Among them, the FCC modified the definition of the loop network element to include all features, functions, and capabilities of the transmission facilities between an ILEC's central office and the loop demarcation point at the customer premises.[29]

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[23] *Petition of Southwestern Bell Telephone Company for Arbitration with MCI WorldCom Communications, Inc.*, Docket No. 21791, Arbitration Award at 5 (May 20, 2000) (*MCI WorldCom Agreement*).

[24] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, FCC 96-325 (rel. Aug. 8, 1996) (*Local Competition Order*).

[25] FTA § 252(i).

[26] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999) (*Iowa Utils. Bd.*).

[27] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, (rel. Nov. 5, 1999) (*UNE Remand Order*).

[28] *UNE Remand Order* ¶ 1.

[29] *UNE Remand Order* at n.301, (revised definition retains the definition from the *Local Competition Order*, but replaces the phrase "network interface device" with "demarcation point," and makes explicit that dark fiber and loop conditioning are among the "features, functions, and capabilities" of the loop).

SBC/Ameritech Merger Conditions and Pronto Waiver Order

SWBT is subject to a set of conditions put in place by the FCC as part of its approval of SBC's merger with Ameritech.[30] The FCC's merger conditions were intended to uphold the FCC's statutory obligation under the Act to open local telecommunications networks to competition by attempting to alleviate the potential competitive harm associated with the SBC/Ameritech merger.[31]

Recent Rulemaking Proceedings

The FCC is currently conducting a broad review of its existing regulatory regime surrounding interconnection and competition. Specifically, the FCC is reexamining its national list of UNEs,[32] as well as national performance measurements for special access services,[33] UNEs, and interconnection.[34] The FCC is also considering the regulatory treatment of wireline broadband offerings, and has tentatively concluded that wireline broadband Internet access is an "information service" with a "telecommunications" component.[35] In addition, the FCC concluded that cable modem services also fall under the scope of information services.[36] The dominance of ILECs in the provision of broadband services, and how to develop regulations accordingly, is also being considered.[37]

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[30] *See In the Matter of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141 (rel. Oct. 8, 1999) (*Merger Order*).

[31] *Merger Order* at ¶ 357.

[32] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, CC Docket No. 01-338 (rel. Dec. 20, 2001) (*Triennial UNE Review*).

[33] *Performance Measurements and Standards for Interstate Special Access Services, et al., Notice of Proposed Rulemaking*, CC Docket No. 01-321 (rel. Nov. 19, 2001).

[34] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al., Notice of Proposed Rulemaking*, CC Docket No. 01-318 (rel. Nov. 19, 2001).

[35] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking* at ¶30, CC Docket No. 02-33 (rel. Feb. 15, 2002) (*Broadband Information Services NPRM*).

[36] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185 (rel. Mar. 15, 2002).

[37] *Development of a Regulatory Framework for Incumbent LEC Broadband Services, Notice of Proposed Rulemaking*, CC Docket No. 01-337 (rel. Dec. 20, 2001) (*Broadband Dominance NPRM*).

Relevant Court Decisions

Iowa Utilities Board v. FCC Cases (Iowa I and Iowa II)

In *Iowa I*, the Eighth Circuit Court of Appeals ruled that the FCC lacked jurisdiction to issue rules regarding the wholesale prices an ILEC could charge competitors to use its facilities to provision local telephone service.[38] Additionally, the Eighth Circuit vacated the FCC's so called "pick and choose" rule and its rule requiring ILECs to recombine network elements upon request by a CLEC.[39]

The Supreme Court reversed the Eighth Circuit, holding that the FCC did have jurisdiction to design a pricing methodology;[40] reinstating the FCC's pick and choose rule;[41] effectively reinstating the FCC's rule prohibiting ILECs from separating UNEs that it currently combines;[42] and vacating the FCC's enumerated list of UNEs.[43] On remand in *Iowa II*, the Eighth Circuit held, in relevant part, that FTA § 252(d)(1) does not permit costs to be based on a hypothetical network,[44] and that FTA § 251(c)(3) obligates requesting carriers to combine previously uncombined UNEs.[45] *Iowa II* is currently on appeal to the Supreme Court.[46]

Supreme Court

In January 1999, the Supreme Court decided the appeal of *Iowa I*.[47] The Court found that the FCC did not adequately consider the "necessary" and "impair" standards in FTA § 251(d)(2) when devising rules for competitor access to network elements, and required the FCC to develop

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[38] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 795, 800, 819 (8th Cir. 1997) (vacating 47 C.F.R. §§ 51.601-51.611) (*Iowa I*).

[39] *Id.* at 800-01, (vacating 47 C.F.R. §§ 51.809 and 51.315(b)-(f)).

[40] *Iowa Utils. Bd., 525 U.S. at 385.*

[41] *Id.* at 395-96.

[42] *Id.* at 395.

[43] *Id.* at 391-92.

[44] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 751-752 (8th Cir. 2000) (vacating 47 C.F.R. § 51.505(b)(1)) (*Iowa II*).

[45] *Id.* at 758-59 (reaffirming vacating of 47 C.F.R. § 51.315(c)-(f)).

[46] *Verizon Communications, Inc. v. FCC*, Nos. 00-511, 00-587, 00-590 and 00-602 (8th Cir. argued Oct. 10, 2001) (*Verizon v. FCC*).

[47] *Iowa Utils. Bd.*, 525 U.S. 366.

a limiting standard that is "rationally related to the goals of the Act."[48] The Court also reversed the Eighth Circuit Court and concluded that the FCC's pick and choose rule is a reasonable interpretation of FTA § 252.

After the original issuance of this Award, the Supreme Court issued its opinion in *Verizon Communications, Inc v. Federal Communications Commission.*[49] In *Verizon*, the Court reversed the Eighth Circuit Court of Appeals' decision vacating the FCC promulgated regulations regarding the combining of UNEs (47 C.F.R. § 51(315(c) – (f)).50 The Court held that 47 C.F.R. § 51.315(c) requires an ILEC to "perform the functions necessary to combine unbundled network elements in any manner," – not necessarily to complete the actual combination – "even if those elements are not ordinarily combined in the incumbent's network," provided such combination is "technically feasible" and neither places the ILEC at a competitive disadvantage nor impairs the ability of other carriers to interconnect with the ILEC's network.[51] In reinstating the rules, the Court deferred to the FCC's construction of section 251(c)(3).[52] In exchange, the entrant must pay a reasonable cost-based fee for whatever the ILEC does.[53]

United States Telecom Association v. Federal Communications Commission

A second significant opinion issued after the Award in this matter was originally issued is the U.S. Circuit Court of Appeals for the District of Columbia decision in *United States Telecom Association v. Federal Communications Commission.*[54] In *USTA*, the D.C. Circuit remanded the *Local Competition Order* and *Line Sharing Order* to the FCC after concluding that the FCC had

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[48] *Id.* at 734.

[49] 535 US __, 122 S.Ct. 1646 (2002) (*Verizon*).

[50] *Verizon* at 1684-87.

[51] 41 C.F.R. § 51.315(c) (1997). "Combining" refers to the "mechanical connection of physical elements within an incumbent's network, or the connection of a competitive carrier's element with the incumbent's network 'in a manner that would allow a requesting carrier to offer the telecommunications service.'" *Verizon* at 1683 (*citing In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 ¶ 294, n. 620 (released August 8, 1996) ("*First Report & Order*").

[52] *Id.* at 1684-87 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) and *First Report and Order* ¶ 294).

[53] *Id.*

b. Should the Daily Usage File be used as the standardized record exchange format for alternately billed calls?

c. Should MCIm be required to order blocking of alternately billed calls for end users that fail to pay for such services?

d. Is it appropriate for SWBT to provide specialized settlement and message exchange processes to MCIm?

e. Is it appropriate to exempt certain alternately billed calls from the settlement process?

CLECs' Position

See DPL Issue No. 41.

SWBT's Position

See DPL Issue No. 41.

Arbitrators' Decision

See DPL Issue No. 41.

DPL ISSUE NO. 41

SWBT: Should the Commission reject Sage's Proposed Interpretation of the ABT language in Sage's Interconnection Agreement with SWBT?

Sage: If CLECs are required to bill for alternately billed traffic, including in-collect calls, what should be the contractual terms and provisions for billing and payment of SWBT in-collect charges?

CLECs' Position

a. MCIm

MCIm explained that uncollectible charges are the most visible dispute between SWBT and the CLEC community, but that the existing T2A language is silent on this issue. MCIm recommended that, if the Arbitrators choose not to adopt MCIm's Alternately Billed Traffic (ABT) language, the Arbitrators should interpret the existing T2A language to require the originating party to bear the burden of uncollectible charges, or at least supplement the existing

T2A language on the key issue of uncollectible charges by requiring the parties to develop procedures for debiting uncollectible charges.[1045]

MCIm maintained that recent data shows SWBT has nearly twice as many ABT messages to bill to MCIm end users as MCIm has for SWBT to bill to its customers. This traffic includes a greater mix of high risk ABT, since over 75% of SWBT ABT is prison payphone traffic.[1046] MCIm contended that the party that generates the revenue for the ABT service should bear the burden of uncollectible ABT charges. To do otherwise, MCIm explained, places unwarranted business risk on the billing party when they are not the party generating revenue, earning profit, or providing the telephone service. MCIm added that it should have the same recourse rights that the ILECs demand from IXCs.[1047] MCIm asserted that it is common practice in the IXC industry for the revenue-earning party to bear the burden of uncollectibles.[1048]

MCIm stated that SWBT's proposed language does not clearly define ABT.[1049] As an example, MCIm stated that SWBT's language in Attachment 6 and 10 is so broad that it can include IXC alternately billed calls which are completely unrelated to the interconnection agreement.[1050] MCIm stated further that there is no distinction provided for CATS vs. non-CATS ABT, which require different operational processing.[1051] MCIm stated that its proposed language carefully defines ABT (section 1, Attachment 27) and sets forth the unique processes and settlement (sections 3, 5-9 of Attachment 27).[1052] MCIm added that there is no language in SWBT's proposal that covers both what is and is not included under this billing and collection relationship. MCIm maintains its proposed language in section 2 of Attachment 27 clearly indicates which traffic is and is not covered by this interconnection agreement.

[1045] MCIm Exh. No. 9, Direct Testimony of Mike McKanna at 12-13 (McKanna Direct).

[1046] *Id.* at 17.

[1047] *Id.* at 14.

[1048] *Id.* at 17.

[1049] *Id.* at 23.

[1050] *Id.*

[1051] *Id.*

[1052] *Id.*

MCIm argued that SWBT's proposal does not adequately address MCIm's ABT that is billable to SWBT.[1053] MCIm stated that SWBT has only included language that allows itself or participating ILECs/CLECs to receive payment from MCIm for ABT billable to our end users. MCIm stated that in section 8.2 of Attachment 10, SWBT provides an obtuse reference indicating that MCIm will be compensated by the billing company for its revenue due, but that no further detail or settlement process is provided or set forth in the T2A or supplemental Appendix ABS as to how this is accomplished.[1054]

MCIm disagreed with SWBT's contention that SWBT does not have a relationship with the MCIm end user, asserting that SWBT is allowing its end users to originate calls on their network with the intention of billing the calls to MCIm end users. Thus, argued MCIm, SWBT has the obligation to protect its network by querying the LIDB before completing the operator service call to prevent fraudulent or additional unpaid usage. MCIm asserted that because it cannot suspend or terminate an end user's local service for failure to pay ABT charges from another service provider, it has the exact same leverage for non-payment of ABT as SWBT, that is, requesting SWBT to block the ability of anyone originating calls on SWBT's network to charge or bill the ABT message to the non-paying MCIm ANI.[1055] However, while MCIm agreed with SWBT that blocking is the way to alleviate financial risk due to non-payment, MCIm disagreed that the CLEC holds the "key" to ABT blocking.[1056] MCIm argued that SWBT owns the UNE or resale network that MCIm leases and thus, has the operational ability to block, but simply does not want the responsibility of doing so.[1057] MCIm expressed willingness to give SWBT (and/or any participating ILEC/CLEC) the contractual right to disable the ability for its end users to originate local and intraLATA calls on SWBT's network (and/or participating ILEC/CLECs' networks) and bill the charges to MCIm ANIs that do not pay, have excessive adjustments, or are involved in fraudulent usage.[1058]

[1053] *Id.* at 27.

[1054] *Id.*

[1055] *Id.* at 19.

[1056] *Id.*

[1057] *Id.* at 20.

[1058] *Id.*

MCIm disagreed with SWBT's claim that SWBT may face irreparable harm if the Commission allows MCIm to recourse uncollectibles. MCIm stated that the Centralized Message Data System (CMDS) network could be utilized for the return of adjustments and bad debt, just as it is currently used for the recourse of rejects and unbillables to the transporting ILEC/CLEC (i.e., revenue earning party) or CMDS could utilize the industry standard record types for recoursing adjustments and bad debt through CMDS. MCIm asserted that SBC has a substantial influence among the other BOC members if it wanted to adjust the CMDS system to enable recourse of adjustments and bad debt.[1059] MCIm stated that the issue of whether or not SWBT has the contractual right to charge back recourse items to participating LECs is SWBT's problem and not MCIm's issue if SWBT made a poor business decision when entering into its third party clearinghouse or CMDS arrangements with the participating LECs. MCIm stated that SWBT is trying to play a game of "hot potato", whereby if it pays 100% for traffic through the clearinghouse/CMDS process without the right of recourse for all uncollectibles, it wants to pass the traffic to MCIm and get 100% reimbursement from MCIm with MCIm having no right to recourse uncollectibles.[1060]

MCIm stated that there is no disagreement between the parties about the difference between an unbillable and an uncollectible (the term SWBT uses to describe bad debt), notwithstanding the parties' differing use of the term "uncollectible" appears to generate some confusion.[1061] MCIm contended the real issue is whether the party providing the billing can be reimbursed for all types of recourse items such as rejects, unbillables, adjustments, and bad debt.[1062] MCIm asserted that it is appropriate that both parties can recourse rejects, unbillables, adjustments, and bad debt to the revenue earning company (i.e., transporting or originating LEC).[1063]

[1059] *Id.*

[1060] *Id.* at 20-21.

[1061] MCIm generically refers to rejects, unbillables, adjustments, and bad debt collectively as "uncollectibles," whereas SWBT's use of the term "uncollectible" only incorporates the idea of bad debt as a recourse item.

[1062] MCIm Exh. No. 9, McKanna Direct at 22.

[1063] *Id.*

MCIm opposed SWBT's proposed uncollectible cap of 10%.[1064] MCIm argued there is no valid economic reason for the billing party to absorb any uncollectibles (i.e., rejects, unbillables, adjustments and bad debt), when the billing party is not the revenue earning party and is paid a very nominal fee per message for billing and collection services ($0.05 per message). In addition, it has been MCI's (the IXC's) experience that bad debt on prison payphone traffic averages 15% with a total uncollectible rate of 22%. MCIm stated that, according to recent data from SWBT, more than 75% of its ABT traffic in Texas is prison payphone. With a bad debt cap of 10% and no ability to recourse any other uncollectibles (i.e., rejects, unbillables, and adjustments), MCIm maintained it will lose at least $.41 per prison payphone message billed ($.05 B&C charges + 12% or $.46 unrecoursed uncollectibles).[1065]

MCIm stated that it is not reasonable for SWBT or any other participating ILEC/CLEC to send retroactive or old traffic to MCIm without regard for the age of toll (section 7.1 of Attachment 20).[1066] MCIm stated that its experience indicates that billing traffic records older than 90 days leads to additional customer inquiry, confusion, denial of knowledge and a much greater percentage of overall uncollectibles. MCIm added that the industry standard is 90 days for domestic calls and 180 days for international calls, and that many states have rules indicating that messages more than 90 days old cannot be billed.[1067]

MCIm refuted SWBT's claim that it lacks any information on the customer that would allow SWBT to direct bill the customer. MCIm responded by saying that, if SWBT desires to bill the customer directly, it can purchase billing name and address (BNA) from MCIm. MCIm added that this situation is no different than what is encountered by all IXCs when billing long distance ABT or dial-around traffic (e.g., 10-10-220).[1068]

b. Sage

Sage expressed willingness to bill SWBT's incollect charges and to make reasonable and parity efforts to collect those charges, but solely as a billing and collection agent for SWBT

[1064] *Id.* at 39.

[1065] *Id.*

[1066] *Id.* at 31.

[1067] *Id.*

[1068] MCIm Exh. No. 10, Rebuttal Testimony of Mike McKanna at 14 (McKanna Rebuttal).

under the terms of section 8.3 of Attachment 10 of the Interconnection Agreement.[1069] Sage asserted that it should be considered only SWBT's billing and collection agent as to incollect charges because it is performing no function other than billing and collecting SWBT charges for these calls.[1070] In describing its limited role in the incollect call process, Sage explained that it provides no service to the end use customer; receives no service from SWBT; has no control over the rates, terms, or conditions for SWBT's tariff collect call services; and has no way of responding to inquiries about the incollect charges since it relies solely upon SWBT's rates messages for billing incollect calls to Sage customers.[1071]

Sage asserted that having the Commission find it to be only a billing and collection agent for SWBT is critical to Sage and that it cannot and should not be held completely financially liable for charges that it flows through at the request of SWBT for services that are provided by SWBT, not Sage.[1072] Sage asserted that, based upon four invoices received from SWBT for incollect charges, the amounts in question total approximately $750,000.[1073]

Sage argued that, as to incollect charges that are uncollectible, Sage should not be held responsible or liable to SWBT, because SWBT should have to bear its own losses for services that SWBT, and not Sage, provided to the end use customer. Sage proposed a definition of "uncollectible" which would exclude charges that Sage cannot collect—either after reasonable and parity collection efforts or if the end use customer is no longer a Sage customer—to ensure that Sage would not be held financially responsible for such charges.[1074] Sage supported the inclusion of fraudulent charges in the definition of uncollectible.[1075]

Sage agreed with SWBT's proposed concept that the end user should be responsible for the Incollect charges. Sage believed this premise is true irrespective of whether the end user is a Sage customer or any other carrier's customer and whether the service at issue is collect calls

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[1069] Sage Exh. No. 1, Nuttall Direct at 28 (Sage defined an incollect call as one that originates from one number and terminates at a different number that is billable to Sage's end use customer).

[1070] *Id.*

[1071] *Id.*

[1072] *Id.* at 10.

[1073] *Id.* at 22.

[1074] *Id.* at 34.

[1075] *Id.* at 34-35.

service or local service or any other service.[1076] Sage stressed, however, that SWBT's proposed ABS appendix does not encourage responsibility of the end users; instead, it shifts the financial burden from SWBT to Sage. There is no difference in the manner that the end user would be affected.[1077] Sage suggested that the Commission should formulate a process that holds the end user accountable for use or acceptance of SWBT's collect services (or services that SWBT has agreed to bill for). Sage noted that the Commission's Interim Order handles that process in a reasonable manner.[1078]

Sage disagreed with SWBT's characterization of its proposed Appendix as "custom-designed" to meet a UNE-P provider's needs.[1079] Sage argued that the only thing that is "custom" about SWBT's proposal is that it is more applicable to UNE-P providers because they rely on the rated DUF records to bill the end user. Sage added the rest of the Appendix is designed to shift the financial responsibility from SWBT to Sage under the "theme" that Sage has a business relationship with its end use customer.[1080]

Sage noted that the CLEC Accessible Letter CLEC 01-210[1081] offered CLECs two different blocking options. Sage believed these options provide a reasonable way to block certain calls from inmate facilities. Sage recognized that this option can only be implemented in SWBT-owned facilities and that as of the hearing on interim relief, SWBT testified that it had implemented the blocking option in only about 60% of its facilities, but Sage believed that this is an appropriate method of blocking and should be implemented in all of SWBT-owned facilities on a permanent basis. Sage noted, however, that the blocking options will not help Sage reduce the amount of uncollectibles.[1082]

Sage concluded that because the SWBT-proposed ABS Appendix is premised on the wrong set of assumptions – primarily that Sage will be financially responsible for all Incollect charges (or up to 90%) – Sage did not believe that "marking up" this appendix would be helpful

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[1076] Sage Exh. No. 2, Nuttall Rebuttal at 5.

[1077] *Id.* at 16.

[1078] *Id.* at 6.

[1079] *Id.* at 13.

[1080] *Id.* at 14.

[1081] Sage Exh. No. 1, Nuttall Direct at Attachment GPN-7.

because it would basically be a rewrite of the appendix from beginning to end. Therefore, Sage recommended that the Arbitrators adopt Sage's proposed amendments to section 8.0 of Attachment.[1083]

SWBT's Position

SWBT asserted that its Alternate Billed Services (ABS)[1084] Appendix is the only valid method for handling the ABS settlement process relevant to MCIm. SWBT argued its ABS Appendix sets forth a clear settlement process and provides detailed definitions and provisions for handling billing via the Daily Usage File (DUF), for addressing billing disputes, for making adjustments, and for ordering blocking.[1085]

SWBT explained that the billing settlement process at issue is a means by which service providers apportion responsibility for payment of charges attributable to their respective end users.[1086] According to SWBT, the process relies on the provision of recorded call detail information to the billing carrier to enable that carrier to bill the end user responsible for the charge.[1087] SWBT testified that call record flows and associated processes are quite different depending on the type of service provider involved.[1088] The ABS settlement process in the proposed SWBT ABS Appendix applies only to UNE-P CLECs like MCIm.[1089] As such, SWBT believed that there is no need to define terms such as "CMDS host" which apply only to settlement for facilities-based CLECs and are, therefore, irrelevant to UNE-P CLECs.[1090] SWBT argued that the established process for UNE-P providers works was custom designed to meet the needs of UNE-P providers, and is universally employed among UNE-P CLECs; therefore, no

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[1082] Sage Exh. No. 2, Nuttall Rebuttal at 27.

[1083] *Id.* at 21-22.

[1084] SWBT Witness June Burgess indicated that "Alternate Billing Services" or ABS, "Alternately Billed Traffic" or ABT and "Alternatively Billed Services" represent the same concept; SWBT's proposed contract language employs the term "Alternate Billed Services," while the parties' Joint DPL refers to "Alternately Billed Traffic" or ABT. *See* SWBT Exh. No. 2, Burgess Direct at 4, n.1. SWBT also indicated that "incollect calls," as they are referred to in Sage's Complaint, are ABS calls. *See Id.* at 19.

[1085] *Id.* at 13; *See also* SWBT Exh. No. 20, Smith Direct at 6.

[1086] SWBT Exh. No. 2, Burgess Direct at 4.

[1087] *Id.*

[1088] *Id.* at 9.

[1089] *Id.* at 6; *See also* SWBT Exh. 20, Smith Direct at 7.

good policy justification exists for one CLEC (MClm) to be permitted to operate under a different system.[1091]

SWBT maintained that because facilities-based providers have their own switches and do their own call-detail recording, they are able to exchange call records with SWBT through a CMDS hosting arrangement. For intraLATA toll collect calls, SWBT stated it utilizes a settlement process referred to as "Clearinghouse" (CH).[1092]

SWBT noted that the CH process requires identification of the CLEC, either by telephone number or indicator, which is not present with a UNE-P CLEC.[1093] SWBT asserted that, because resellers lack their own switches and cannot, therefore, have their own call detail recording, SWBT simply bills the reselling CLEC for ABS calls just as it bills the CLEC for all other services the CLEC buys from SWBT at a wholesale rate, leaving the reseller to determine how to bill the end user.[1094] SWBT argued the settlement process available for resellers is inappropriate for UNE-P CLECs because the pricing structure is entirely different between resale and UNE-P.[1095] Similarly, for UNE-P CLECs that also have no means of recording call detail on their own, SWBT maintained that it provides ABS call detail recordings in the form of rated messages, which the CLEC then places on its end user's bill. It is SWBT's position that the UNE-P CLEC must reimburse SWBT for the rated messages, but the CLEC is credited a billing and collection fee for billing its end users for the calls.[1096]

SWBT averred that the use of DUF (Daily Usage File) records containing recorded call detail information is the cornerstone of the settlement process for UNE-P CLECs.[1097] SWBT maintained that DUF records, sent electronically by SWBT to CLECs on a daily basis, typically contain multiple types of detailed records, or "messages", showing the date, time and length of call, the originating, terminating, and billing number, among other characteristics. The messages

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[1090] SWBT Exh. No. 2, Burgess Direct at 18.

[1091] *Id.* at 9.

[1092] *Id.* at 7.

[1093] *Id.* at 8.

[1094] *Id.* at 7-8.

[1095] *Id.* at 9.

[1096] *Id.* at 8.

[1097] *Id.* at 9.

for ABS calls are also rated. SWBT stated that, in the case of ABS calls, only those calls that are accepted by the CLEC's end user are included in the DUF. CLECs then use DUF records to place charges on an end user's bill.[1098] SWBT testified that DUF records apply to all CLEC billing, not just to ABS calls, and are universally utilized in the telecommunications industry. DUF records are provided under national exchange message interface (EMI) standards.[1099]

SWBT claimed that, consistent with industry practice in an ILEC-to-ILEC context, SWBT cannot recourse the uncollectible back to the originating carrier.[1100] SWBT disagreed with MCIm's assertion that it is the industry standard for originating carriers to bear the burden of absorbing uncollectible charges. SWBT reiterated that it is MCIm's end user who authorized and accepted the ABS calls. SWBT asserted that it lacks leverage to deal with an MCIm customer who fails to pay, because it lacks the information necessary to enable SWBT to bill the customer, and it lacks the authority to suspend or terminate the end user's local service.[1101]

SWBT further opposed MCIm's definition of the term "uncollectible" as overly broad because it would include rejects, unbillable calls, adjustments, and bad debts. Of particular concern to SWBT were unbillable calls, calls that are never billed to an end user for a variety of reasons, including situations where information is missing from the DUF records. SWBT asserted that in such cases, bill message information can be corrected, enabling SWBT to resubmit the charge. But if unbillables are included under the term "uncollectible" SWBT would never be able to bill for the charge and unbillables represent a large portion of ABS calls historically billed to MCIm.[1102]

SWBT objected to the exemption of certain ABS calls from the settlement process and, in particular, the exemption of calls that originate from a correctional facility.[1103] SWBT stated that MCIm is seeking to exclude several types of calls from the settlement process that are clearly ABS calls, such as: "pay per call" service charges (900 or 976); information charges (sweepstakes, credit cards); charges to cellular services; and messages originating from

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[1098] *Id.*

[1099] *Id.* at 11.

[1100] *Id.* at 14.

[1101] SWBT Exh. No. 20, Smith Direct at 15.

[1102] *Id.* at 16.

correctional facilities.[1104] SWBT argued that, just like other ABS calls, the UNE-P CLEC end user has accepted the call and agreed to assume responsibility for the charge; excluding these calls from the settlement process would simply encourage ongoing non-payment by MCIm end users. SWBT averred that unbilled collect calls from SWBT payphones in correctional institutions account for about 90% of the lost revenues SWBT is facing, costing SWBT millions of dollars.[1105]

In addition, SWBT argued that it was inappropriate for MCIm to exclude the billing of messages that are over 90 days old from the ABS settlement process.[1106] SWBT asserted that regardless of any MCIm internal policy on backbilling, P.U.C. SUBST. R. 26.27(b)(3)(B) allows certificated telecommunications utilities (CTUs) to backbill a customer for an amount that was underbilled, including failure to bill at all, for up to six months from the date the initial error was discovered.[1107]

SWBT contended MCIm has improperly defined what an uncollectible is, which caused its estimated level of uncollectibles to be exaggerated.[1108] SWBT stated that uncollectibles should be defined as charges that have been correctly billed by a CLEC, but through reasonable collection efforts, the CLEC has been unable to collect payments from its end user.[1109] SWBT added that the definition of uncollectibles should not include unbillables, rejects, or adjustments.[1110]

SWBT noted that Sage differs from MCIm in that Sage has existing T2A-based language. Thus, SWBT argued the proper focus for Sage is the T2A and especially Attachment 10, section 8.3 - not the ABS Appendix.[1111] SWBT argued that Sage's end users accept ABS calls and should pay for them. If Sage can recourse uncollectibles, its end users have no incentive to pay

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[1103] SWBT Exh. No. 2, Burgess Direct at 16.

[1104] SWBT Exh. No. 20, Smith Direct at 17.

[1105] SWBT Exh. No. 2, Burgess Direct at 17.

[1106] SWBT Exh. No. 20, Smith Direct at 18.

[1107] *Id.*

[1108] SWBT Exh. No. 3, Burgess Rebuttal at 2-3.

[1109] *Id.* at 6.

[1110] *Id.* at 3.

[1111] *Id.* at 11.

and Sage has no incentive to collect.[1112] SWBT concluded that Sage is the local service provider of its end users, and it is fully responsible for the ABS charges those end users have willingly accepted and authorized.[1113]

SWBT asserted that 900, 976, and other PPC services do not belong in the ABS Appendix or the ABS settlement process. 900 calls by their very nature are not even completed unless the end user accepting responsibility for the call agrees to pay the attendant charges.[1114]

SWBT maintained it is unreasonable to require SWBT to develop a specific type of blocking option so that MCIm's end users could continue to receive IXC collect and third party billed calls. If MCIm is truly serious about minimizing its financial risk on ABS calls, SWBT stated that MCIm will send requests to block its end users that do not pay and abuse this service from receiving all collect and third party billed calls.[1115]

SWBT disagreed with MCIm that it has the same leverage as MCIm on an end user that fails to pay ABS charges. SWBT stated that the end user is MCIm's local service customer, not SWBT's.[1116] SWBT asked the Arbitrators to find that SWBT does not have the business relationship with the end user.[1117]

SWBT objected to an interpretation of the existing Sage/SWBT interconnection agreement that requires SWBT to provide ABS calls to Sage end users at no charge. SWBT stated that it has offered Sage the same ABS Appendix SWBT is offering MCIm, but that Sage has rejected it.[1118] SWBT asserted that Sage fully agreed to all provisions associated with ABS calls by opting into the T2A and operating under this agreement for well over 18 months, since Commission approval on February 2, 2000.[1119]

[1112] *Id.* at 11-12.

[1113] SWBT Exh. No. 21, Smith Rebuttal at 10.

[1114] SWBT Exh. No. 3, Burgess Rebuttal at 13.

[1115] SWBT Exh. No. 21, Smith Rebuttal at 13.

[1116] *Id.* at 23.

[1117] *Id.* at 25.

[1118] SWBT Exh. No. 2, Burgess Direct at 19.

[1119] SWBT Exh. No. 20, Smith Direct at 22.

SWBT maintained that, in the existing Sage/SWBT agreement, section 8.3, Attachment 10 is the primary language governing this issue. SWBT asserted that this language requires Sage to utilize the rated ABS messages it receives from SWBT in the DUF, to place the charges on Sage's end users' bills, and to pay SWBT for the charges, less a billing and collection fee. SWBT claimed that Sage, like MCIm, refused to cooperate with SWBT and bill for ABS calls through alternative means before certain billing system problems preventing SWBT from passing rated messages were corrected. SWBT stated that, since August 8, 2001, it has been providing the rated messages necessary for Sage to bill its end users for ABS calls for which those end users have accepted responsibility for payment and that Sage is now billing its end users for ABS calls pursuant to the Interim Order issued in Docket No. 24593.[1120] Prior to that time, Sage's end users had not been billed for "incollects" or ABS calls; thus, the end users had been able to receive collect calls and other incollect services at no charge. SWBT averred that the interconnection agreement clearly does not envision SWBT's providing incollect services to Sage's end users at no charge.[1121]

Arbitrators' Decision

The Arbitrators take up DPL Issue Nos. 40 and 41 together, but reach slightly different conclusions regarding language for the proposed going-forward interconnection agreements and interpretation of the existing Sage/SWBT interconnection agreement for purposes of resolving their post-interconnection dispute. First, as to the proposed going-forward interconnection agreements, the Arbitrators find that the detail and complexity of the issues related to Alternately Billed Traffic (ABT) over the UNE platform, the parties' disagreements over even the basic definitions of terms, and the fact that ABT issues involve multiple carriers, not merely the parties to the interconnection agreement, all support a finding that ABT over the UNE platform should be addressed in a separate billing agreement between the parties and should not be incorporated into an interconnection agreement. Where parties are unable or unwilling to develop a comprehensive billing agreement to address ABT, then the provider of the Incollect or Outcollect services shall bill the end use customer directly.

[1120] SWBT Exh. No. 2, Burgess Direct at 20.

[1121] SWBT Exh. No. 20, Smith Direct at 23.

Regardless of whether, or under what terms, a comprehensive billing agreement is developed external to this interconnection agreement, the parties must provide the information required to facilitate billing by other parties. These requirements, liabilities, and penalties regarding non-performance are detailed in the contract language provided by the Arbitrators:

Further, the Arbitrators reach the following conclusions regarding the specific questions posed by the CLECs:

(a) Yes, CLECs should be required to collect SWBT incollect charges for CLEC-customer accepted third-party calls. The express terms of the T2A, as signed by both Sage and MCI WorldCom, indicate that the CLEC accepted this responsibility.

(b) Yes, the CLEC should be considered SWBT's billing agent for purposes of collecting the incollect charges. Existing § 8.3 of Attachment 10 generally describes an arrangement whereby SWBT will provide rated messages and the CLEC will bill the Incollects in return for a billing and collection fee.

(c) No, the CLEC should not be responsible or liable to SWBT for any Incollect charges that are uncollectible. Section 8.3 of Attachment 10 establishes a billing arrangement only. This conclusion is buttressed by the specification in the contract language of compensation for the CLEC at the rate of $0.05 per billed message. The relatively small amount of compensation paid to the CLEC, while presumably sufficient consideration for billing, defeats the suggestion that CLECs have liability for uncollectible charges.

(d) Uncollectible should be defined to not include rejects, unbillables, or adjustments.

"Uncollectible charges are defined as ABT charges billed to CLEC by SWBT which are not able to be collected by CLEC from CLEC's End Users despite collection efforts by CLEC. This term does not include "rejects", "unbillables," or "adjustments." CLEC is obligated to timely return all rejects and unbillables to SWBT to allow SWBT to correct the bill message information and resubmit the charge for billing."

(e) Yes, the definition of "uncollectible" should include fraudulent charges to the extent that the fraudulent charges otherwise also meet the criteria in the above definition of "uncollectible".

The Arbitrators find that, both under the terms of the existing contract between Sage and SWBT, and as set forth in the interim ruling in Docket No. 24593, it is appropriate for Sage to bill for alternately billed traffic provided by SWBT, the payphone provider, to a Sage end use customer. Regardless of whether Sage received rated DUF messages from the inception of its contract in 1997, the fact remains that Sage agreed to bill its customers in return for a per-record fee. That is not to say, however, that Sage agreed to be fully responsible for all amounts not paid by its customers. The existing contract is silent on this issue, and there is no basis for concluding from the contract's silence that Sage assumed this responsibility. The Arbitrators therefore conclude that Sage agreed only to bill its customers for alternately billed traffic.

SWBT's reliance on its own Accessible Letters is misplaced. The Accessible Letter is a tool used by SWBT to convey to CLECs operational changes to its processes. The Accessible Letter does not vest SWBT with authority to unilaterally change the terms of a bilateral contract.

Given that the Arbitrators have found that Sage is a billing and collection agent and is not responsible for uncollectibles, the Arbitrators conclude that there is no longer a reason to allow Sage (or any other party to the same T2A contract) to unilaterally block calls, either through a toll billing exception or selective blocking from inmate facilities. However, the Arbitrators acknowledge that Sage has been making efforts to redress past billing practices, and has relied upon the availability of selective blocking from inmate facilities. Consistent with the Interim Award in Docket No. 24593 and under this Award, SWBT shall continue to provide selective blocking from inmate facilities to Sage until June 15, 2002. From that date forward, Sage shall bill for all Incollect calls, whatever their source, and it is the obligation of SWBT, upon a showing of non-payment, to request Sage to initiate call blocking, as set forth in the call blocking language set forth below.

The Arbitrators find MCIm's request to "opt out of this entire mess by blocking SWBT-originated ABT,"[1122] *with SWBT bearing the entire cost of developing a blocking mechanism,*

[1122] *See* MCIm's Initial Brief at 46.

patently unfair. Ensuring that customers pay for collect calls they choose to accept, whether or not such calls originate in prison facilities, should be a mutual goal for all competitors. Moreover, allowing MCIm to unilaterally prevent its customers from receiving any SWBT-originated ABT, regardless of a customer's payment history, would not be in the public interest. The Arbitrators conclude that clarification of the responsibilities of the CLEC regarding blocking is needed. Accordingly, the Arbitrators incorporate language for a new Attachment 27-ABT to the interconnection agreement, as shown in the attached contract matrix.

DPL ISSUE NO. 42

SWBT: Should SWBT be allowed to recover the cost associated with call blocking in end offices where AIN is deployed?

CLECs: Should CLEC be responsible for charges incurred when blocking provided by SWBT fails?

CLEC's position

a. MCIm

According to MCIm, whether or not SWBT charges its retail customers for some forms of call blocking is irrelevant to a determination of whether SWBT should be permitted to charge MCIm for those forms of call blocking. MCIm contended that in a UNE environment, unbundled switching already provides the capabilities of provisioning call blocking. Therefore, according to MCIm, no additional charge is required.[1123] MCIm asserted that its position is consistent with the Commission's order regarding call blocking in the Mega-Arbitration and the evidence adduces by SWBT is addressed to cost recovery for call blocking where AIN is *not* deployed rather than where AIN is deployed.

MCIm agreed that SWBT should be allowed to recover the cost associated with call blocking in end offices where AIN is deployed. MCIm further stated that because an AIN solution allows CLECs to avoid replicating all the line class codes when implementing call blocking, the cost of call blocking was already recovered in the query rate, and there is thus no

[1123] MCIm Exh. No. 4, Turner Rebuttal at 26-28.